RINOTA CONSTRUCTION SDN BHD v. MASCON RINOTA SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
AZIZAH NAWAWI JCA
[CIVIL APPEAL NO: W-02(IM)-1481-08-2019]
17 MARCH 2021

COMPANY LAW: *Oppression – Remedy – Complaint of oppressive conduct pertaining to accounting malpractices and financial wrong doings – Buy-Out Order and Accountant Order obtained – Application to appoint accounting firm to prepare expert report to advise court on fair price of shareholding – Whether application to seek consequential Order – Whether sought to vary essence of Order – Whether consistent with Buy-Out Order and Accountant Order – Whether ought to be allowed*

CIVIL PROCEDURE: *Judgments and orders – Appeal – Competency of appeal – Whether Order appealable – Whether made during course of trial – Whether decision finally disposed of rights of parties – Courts of Judicature Act 1964, s. 3*

The appellant filed a petition under s. 181 of the Companies Act 1965 on the grounds that it was oppressed by the second and the fourth to seventh respondents. The oppressive conduct complained of centred on accounting malpractices and financial wrongdoings committed by the respondents and the total disregard by the respondents of the petitioners' legitimate expectation arising from the formation of a joint venture company, Mascon Rinota Sdn Bhd ('first respondent'). The appellant prayed, among others, that its shareholding in the joint venture company be bought out by the second to seventh respondents. On 29 August 2012, the High Court granted the petitioner's prayer for its shares to be bought by the respondents. The paragraphs most relevant to this appeal in the High Court Order were para. (a), *ie,* that the second and the fourth to seventh respondents jointly and severally purchased the shares owned by the petitioner in the first respondent at such price and terms determined by the High Court, after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the respondents ('Buy-Out Order'); and para. (c), that a certified public accountant be appointed to inspect the accounts of the first respondent for the period beginning June 1995 to the date of the order and to report to the High Court the results of such inspection ('Accountant Order'). Dissatisfied, the respondent appealed to the Court of Appeal. In the meantime, in order to give effect to the Buy-Out Order and the Account Order, the appellant filed encl. 66 proposing several accountancy firms to be appointed by the High Court. By way of the Order dated 20 September 2013,

the High Court appointed BDO Governance Advisory Sdn Bhd to prepare an accounting report pursuant to the Accountant Order. However, on 12 May 2014 and before BDO Governance Advisory could complete its work, the Court of Appeal had allowed the respondent's appeal and overturned the High Court's decision. The appellant appealed to the Federal Court ('FC') and the appeal was allowed wherein the Federal Court reversed the Court of Appeal decision and restored the High Court Order. Following the decision, the appellant obtained an extension of time for the preparation of the accounting report. However, BDO Governance Advisory was not able to inspect the accounts and to prepare the accounting report by the dateline given. The appellant therefore filed a fresh notice of application to appoint another accountant, Ferrier Hodgson MH Sdn Bhd, to prepare an expert report to advise the High Court on the fair price of the petitioner's shares in the first respondent to be purchased jointly and severally by the second and the fourth to seventh respondents ('petitioner's application'). The appellant's notice of application was dismissed by the High Court Judge ('HCJ') on the grounds that the main prayer by the appellant was not consistent with paras. (a) and (c) of the High Court Order and, since the words 'liberty to apply' did not appear in the High Court Order, the appellant was not at liberty to file this application. Hence, this appeal. The question for the court's determination was whether the HCJ was correct in taking the literal meaning instead of the purposive approach in interpreting the High Court Order. Before the commencement of the appeal, the respondent brought up, as a preliminary issue, the competency of the appeal contending that the appeal ought to be dismissed *in limine* on the basis that the impugned order was non-appealable pursuant to s. 3 of the Courts of Judicature Act 1964 ('CJA').

Held (allowing appeal; setting aside High Court Order)
Per Mohamad Zabidin Mohd Diah JCA delivering the judgment of the court:

(1) The list of complaints of accounting malpractices and financial wrong doings committed by the respondents which compelled the appellant to seek the Buy-Out Order and the Accountant Order, meant that the Orders must be coherent, in that, the accountant's role was to assist the court in making the necessary adjustments to the accounts of the joint venture company and provide assistance and guidance to the court in determining the price of the Buy-Out Order. To read the Order literally would mean the Buy-Out Order would stand independently of each other and this invariably would result in the HCJ having to make necessary adjustment to the accounts of the joint venture company as mandated under the Buy-Out Order. This adjustment would be made by the judge without the assistance of an accountant to undertake the task of making the necessary accounting adjustments. This was not what the High Court Order was intended to be. (para 20)

(2) The Accountant Order, read literally, led the appellant to not being able to move the petition for oppression to its conclusion, even though the High Court's finding, as affirmed by the FC, was in the appellant's favour. This would render the remedy of buy-out granted by the High Court and the FC meaningless and without effect. The order that the appellant was seeking under the main prayer was consistent with the purpose of the High Court Order dated 29 August 2012 and therefore, the HCJ should have adopted a purposive interpretation. Hence, the HCJ erred in finding it to be inconsistent with the said Order. (paras 21, 22 & 27)

(3) *Prima facie*, 'liberty to apply' is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Ultimately, whether an application for variation may be allowed under 'liberty to apply' depends very much on the purpose of the application. If it varies the essence of the agreement then the application must fall outside the ambit of 'liberty to apply'. Since the order sought by the appellant in the main prayer was necessary in order to bring a meaningful resolution and conclusion to the issue of oppression of the petitioner by the respondents and it did not vary the essence of the said High Court Order, it followed that the phrase 'liberty to apply' could be implied in the High Court Order. (paras 25 & 26)

(4) Section 3 of the CJA defines 'decision' to mean judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any course or matter which does not finally dispose of the rights of the parties. The trial was completed when the High Court found, and the FC affirmed, that there was indeed oppression by the fourth to seventh respondents culminating in the court ordering the second and fourth to seventh respondents to jointly and severally purchase the shares owned by the appellant in the first respondent. Hence, the application was made, not during the course of the trial. And, the refusal by the HCJ to appoint an accountant did finally dispose of the rights of the appellant. It followed that the decision by the HCJ was appealable as (i) it was not made during the course of a trial, and (ii) it disposed of the rights of the appellant. The respondents' preliminary objection was thus dismissed. (paras 30, 32 & 33)

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Cristel v. Cristel [1951] 2 KB 725 ***(refd)***

Hong Kong Bank (Malaysia) Bhd v. Raja Letchumi Ramarajoo & Ors [1996] 4 CLJ 155 CA ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***
San Souci; Ltd v. VRL Services Ltd [2012] All ER (D) 186 ***(refd)***
Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors [2017] 2 CLJ 32 FC ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), s. 181
Courts of Judicature Act 1964, s. 3

Other source(s) referred to:
Halsbury Laws of England, 4th edn, Vol 37, 2001, para 1228

For the appellant - Wong Hin Loong, Karen Ng Yueh Ying & Kenny Chan Yew Hoong; M/s Azman Davidson & Co
For the respondents - Prem Ramachandra; M/s Kumar Partnership

[Editor's note: For the High Court judgment, please see Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2012] 1 LNS 802 (overruled).]

Reported by S Barathi

JUDGMENT

Mohamad Zabidin Mohd Diah JCA:

[1] This is an interlocutory appeal against the High Court order dated 23 July 2019 ("the impugned order") dismissing the petitioner's application to appoint Ferrier Hodgson MH Sdn Bhd ("FHMH") to prepare an expert report to advise the High Court on the fair price of the petitioner's shares in the first respondent to be purchased jointly and severally by the second and the fourth to the seventh respondents ("petitioner's application").

Material Background Facts

[2] By way of a petition filed in the High Court under s. 181 of the Companies Act 1965, the appellant contended that it was oppressed by the second respondent and the fourth to the seventh respondents.

[3] The oppressive conduct complained of centred on accounting malpractices and financial wrongdoings committed by the respondents and the total disregard by respondents of the petitioner's legitimate expectation arising from the formation of a joint venture company, Mascon Rinota Sdn Bhd (first respondent).

[4] In the petition, the appellant prayed, among others, that its shareholding in the joint venture company be bought out by the second to the seventh respondents.

[5] On 29 August 2012, the High Court granted the petitioner's prayer for its shares to be bought by the respondents. Paragraphs (a) and (c) of the High Court order are most relevant to this appeal. Paragraphs (a) and (c) of the order provides:

(i) that the second and the fourth to the seventh respondents jointly and severally purchased the shares owned by the petitioner in the first respondent at such price and terms determined by the High Court, after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the respondents (hereafter referred to as "buy-out order").

(ii) that a certified public accountant be appointed to inspect the accounts of the first respondent for the period beginning June 1995 to the date of the order and to report to the High Court the results of such inspection (hereafter referred to as "accountant order").

[6] Not satisfied with the High Court order, the respondent appealed to the Court of Appeal. In the meantime, in order to give effect to the buy-out order and the account order, the appellant filed encl. 66 proposing several accountancy firms to be appointed by the High Court. By way of the order dated 20 September 2013, the High Court appointed BDO Governance Advisory Sdn Bhd to prepare an accounting report pursuant to the account order by the High Court.

[7] However, on 12 May 2014 and before BDO Governance Advisory Sdn Bhd could complete its work, the Court of Appeal had allowed the respondent's appeal and overturned the High Court's decision. When the High Court order was overturned by the Court of Appeal, the preparation of the accounting report was kept in abeyance.

[8] The appellant appealed to the Federal Court against the Court of Appeal decision. On 22 May 2017, the Federal Court allowed the appellant's appeal. The Federal Court reversed the Court of Appeal decision and restored the High Court Order dated 29 August 2012.

[9] Following the restoration of the High Court order by the Federal Court on 22 May 2017, the appellant filed an application to extend the time for the preparation of the accounting report. The application for extension of time was allowed and BDO Governance Advisory Sdn Bhd was supposed to prepare the accounting report by 26 December 2018.

[10] Unfortunately, the BDO Governance Advisory Sdn Bhd was not able to inspect the account and to prepare the accounting report by the dateline given.

[11] The appellant then filed a fresh notice of application to appoint another accountant, Ferrier Hodgson MH Sdn Bhd to prepare an expert report to advice the High Court. The main prayer in the said application reads:

That the Petitioner be allowed to appoint Ferrier Hodgson MH Sdn Bhd to prepare an expert report on behalf of the Petitioner to advice this Honourable Court the fair price of the shares owned by the Petitioner in the 1st Respondent to be purchased jointly and severally by the 2nd, 4th, 5th, 6th, and 7th Respondent after taking into account the compensation to the Petitioner with regards to the various acts of oppression found by the High Court.

[12] The appellant's application was contested by the respondents. Basically, there were two grounds relied by the respondents to contest the appellant's application. They were:

(i) the main prayer in the appellant's application is not consistent with para. (a) and para. (c) of the order; and

(ii) the appellant's application is not to seek a consequential order but instead to vary the said order. Since provision for "liberty to apply" is not stated in the order, the appellant is not at liberty to make the application.

[13] The appellant's notice of application was dismissed by the learned High Court Judge. Hence this appeal before us.

High Court Decision

[14] From the learned High Court Judge's written ground, it is apparent that the learned High Court Judge agreed with the respondent's contention that the main prayer by the appellant is not consistent with paras. (a) and (c) of the High Court order and since the words "liberty to apply" do not appear in the High Court order, the appellant is not at liberty to file this application.

Appeal

[15] As alluded to earlier, the respondents' position which was agreed by the learned High Court Judge, is that the order sought by the appellant under the main prayer is not consistent with the buy-out order and the account order. The appellant's application, according to learned counsel for the respondent, tantamount to a variation and amendment of the Federal Court order. It was further submitted by learned counsel for the respondent that the appellant's application is not to seek a consequential order but an application to vary the impugned order which is final, binding and conclusive.

[16] Learned counsel for the appellant on the other hand submitted that the learned High Court Judge had erred when His Lordship took a literal and rigid approach in interpreting the order dated 29 August 2012 without taking into account the background circumstances of the petition and significant findings and conclusion contained in ground of judgment of High Court and the Federal Court. The appellant's position is that a purposive approach

should be taken in interpreting the orders. The buy out order and the accountant order must be read conjunctively and coherently so as to give purpose and meaning to the order dated 29 August 2012 without varying the essence of the said order.

Our Deliberation And Decision

Whether The Main Prayer Is Inconsistent With The Order

[17] Having perused the learned High Court's ground of judgment and submission by parties we are of the view that the question before us is whether the learned High Court Judge was correct in taking the literal meaning instead of the purposive approach in interpreting the order dated 29 August 2012.

[18] After going through the factual matrix and chronological background of this case which lead to this application by the appellant, we are constrained to agree with learned counsel for the appellant that the learned High Court Judge had erred when His Lordship took a literal and rigid approach in interpreting the order dated 29 August 2012. It is axiomatic that court orders are the derivative and distillation of the important factors like the background of cases, how those cases are pleaded, what redress is being sought by the complainant and what are the court's reasoning process culminating in the granting of the order.

[19] The legal principles on the purposive approach that could be gleaned from the cases referred to us by the appellant's counsel are that the court may:

(i) look at the background to the case (see *Hong Kong Bank (Malaysia) Bhd v. Raja Letchumi Ramarajoo & Ors* [1996] 4 CLJ 155);

(ii) look to the pleadings of the case(see *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833);

(iii) look to the ground of judgment (see *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833); and

(iv) look at the essential issue of what the court order is supposed to resolve (see Privy Council's case *San Souci; Ltd v. VRL Services Ltd* [2012] All ER (D) 186 (May); [2012] UKPC 6; and *Hong Kong Bank (Malaysia) Bhd v. Raja Letchumi Ramarajoo & Ors* [1996] 4 CLJ 155).

[20] Coming back to this appeal, having regard to the narrative of the petition for oppression of a minority shareholder, the list of complaints of accounting malpractices and financial wrongdoings committed by respondents as listed in paras. 25 to 55 of the petition which compelled the appellant to seek the following relief:

(i) a buy-out of the petitioner's shares in the joint venture company after making all necessary adjustments to the accounts of the joint venture company to compensate for such accounting malpractices and financial wrongdoings; and

(ii) the appointment of an accountant to inspect the accounts of the joint venture company,

mean that the buy-out order and the accountant order must be read coherently in that the accountant's role is to assist the court in making the necessary adjustments to the accounts of the joint venture company and provide assistance and guidance to the court in determining the price of the buy-out order. To read the order literally, as was asked by the appellant and agreed by the learned High Court Judge, would mean the buy-out order (para. (a)) and the accountant order (para. (b)) would stand independently of each other and this invariably would result in the High Court Judge having to make necessary adjustment to the accounts of the joint venture company as mandated under buy-out order and this adjustment would be made by the judge without the assistance of an accountant to undertake the task of making these necessary accounting adjustment. This, in our considered view, was not what the order the High Court order was intended to be.

[21] The learned High Court Judge in dismissing the appellant's application, read the accountant order literally, that is, that the accountant can only inspect the joint venture company account and report the result of the inspection to the High Court and thus came to a conclusion that the main prayer of the appellant's application is not consistent with the order. This, in our view, has led to the appellant not being able to move the petition for oppression to its conclusion even though the High Court's finding which was affirmed by the Federal Court is in the appellant's favour. This would render the remedy of buy-out as given under buy-out order granted by the High Court and the Federal Court meaningless and without effect. This in our considered view, underscore the need to use purposive approach in interpreting the High Court order dated 29 August 2012, in order to bring meaningful resolution and conclusion to the issue of oppression of the petitioner by the respondents.

[22] Having perused the learned High Court Judge's ground of judgment in granting the buy-out order and the accountant's order, and after going through the factual matrix and chronological background of this case which lead to this application by the appellant, we are of the view that the order the appellant is seeking under the main prayer is consistent with the purpose of the High Court order dated 29 August 2012. The order sought in the main prayer is necessary in order to bring a meaningful resolution and conclusion to the issue of oppression of the petitioner by the respondents and it does not

vary the essence of the said High Court order. Hence, we find, with respect, the learned High Court Judge had erred in finding it to be inconsistent with the said order.

Liberty To Apply

[23] The learned High Court Judge, in dismissing the appellant's application, also made a finding that since words "liberty to apply" are not expressly stated in the High Court order, the appellant is not at liberty to make this application to vary the said order. The learned High Court Judge wrote in his ground:

> ... The court cannot impose on the parties to include the term "liberty to apply". And in this case as stated there is no such term. Since this term is not adopted as a prayer, the court cannot force the parties to include this term in the order ...

[24] Regarding liberty to apply, *Halsbury Laws of England,* 4th edn, vol. 37, 2001, para. 1228 states "all orders of the court carry with them inherent liberty to apply to court and there is no need to reserve expressly such liberty in the case of orders which are not final".

[25] *Prima facie*, "liberty to apply" is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. *Prima facie*, certainly, it does not entitle people to come and ask that the order itself shall be varied (see English Court of Appeal case *Cristel v. Cristel* [1951] 2 KB 725). Ultimately, whether an application for variation may be allowed under liberty to apply depends very much on the purpose of the application, say, whether the application is necessary to obtain the decision of the court to enforce the agreement without varying the essence of the order or whether it has the effect of varying that agreement. If it varies the essence of the agreement then the application must fall outside the ambit of "liberty to apply" (see *Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors* [2017] 2 CLJ 32; [2017] 1 MLJ 301).

[26] In this case, since we are of the view that the order sought by the appellant in the main prayer is necessary in order to bring a meaningful resolution and conclusion to the issue of oppression of the petitioner by the respondents and it does not vary the essence of the said High Court order, it follows that the phrase "liberty to apply" could be implied in the High Court order.

Conclusion

[27] As a conclusion, it is our considered view that by taking a literal interpretation of the High Court order, this would result in the appellant's inability to move the petition for oppression to its conclusion even though the High Court's finding which was affirmed by the Federal Court is in the

appellant's favour. Hence, a purposive interpretation should have been adopted by the learned High Court Judge. Going by the purposive interpretation, we are of the view that the order prayed by the appellant in the main prayer is consistent with the purpose of the High Court order dated 29 August 2012. The main prayer, if granted, would not vary the essence of the High Court order. Thus, the phrase "liberty to apply" is implied in the order. The appellant's application should have been granted.

[28] Based on the above said reasons, we allowed the appellant's appeal. We hereby set aside the High Court order and substituted the same with an order in terms of the appellant's application.

Preliminary Issues

[29] Before the commencement of the appeal before us, learned counsel for the respondent brought up as a preliminary issue the competency of this appeal. It was the respondent's case that this appeal ought to be dismissed *in limine* on the basis that the impugned order is non-appealable pursuant to s. 3 of the Courts of Judicature Act 1964. Learned counsel quoted to us Federal Court's decision *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153 which held, among others, an aggrieved party in a civil case does not have the right to appeal against any decision made by the court in the course of a trial of any course or matter which does not finally disposed of the rights of the parties.

Decision On The Preliminary Issue

[30] Section 3 of the Courts of Judicature Act 1964 defines "decision" to mean judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any course or matter which does not finally disposed of the rights of the parties. It is clear that any order which is made during the course of a trial AND the said order does not finally dispose of the right of parties; there is no right of appeal against such order. In other words, in considering whether an order is appealable or otherwise, the court has to see when the application and the order was made and whether it finally disposed of the rights of parties. If the application and the order was made not during the course of a trial, it is appealable even though it does not finally disposed of the rights of the parties.

[31] Reverting to this appeal, learned counsel for the respondents submitted that the trial of the appellant's oppressive action was split into two stages: liability and assessment. Although the trial on liability had concluded, the trial on assessment is pending. Thus according to respondents' counsel, the order of the High Court Judge refusing the appellant's application was made during the trial and since it does not dispose of the rights of the parties, it is not appealable.

[32] After going through the chronological background of this case, with respect, we are unable to agree with learned counsel for the respondents' stance. In our considered view, the trial which basically was to determine whether there was oppression by the fourth to seventh respondents on the appellant under s. 181 of the Companies Act 1965 was completed when the High Court found, and which was subsequently affirmed by the Federal Court, that there was indeed oppression by the fourth to seventh respondents culminating in the court ordering the second, fourth to seventh respondents to jointly and severally purchase the shares own by the appellant in the first respondent. Hence, when this application was made by the appellant to appoint the accountant, it was made not during the cause of the trial. And when the learned High Court Judge refused to allow the appellant application to appoint the accountant, it practically left the appellant with no chance of bringing the buy-out order granted by High Court Judge, which was affirmed by the Federal Court to a meaningful conclusion. As such we are of the view, the refusal by the learned High Court Judge to appoint an accountant did finally disposed of the right of the appellant.

[33] Therefore we find that the decision made by the learned High Court Judge is appealable for (i) it was not made during the course of a trial; and (ii) it disposed of the right of the appellant. For these reasons, we dismissed the respondents' preliminary objection and proceeded to hear the merits of the appeal.